Previously memorandum on *lex situs*

UNIFORM SUCCESSION LAWS: THE EFFECT OF THE LEX SITUS AND MOZAMBIQUE RULES ON SUCCESSION TO IMMOVABLE PROPERTY

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PREFACE

The Standing Committee of Attorneys-General of Australia decided in 1991 that steps should be taken towards rendering uniform the succession laws of the Australian states and Territories. The Attorney-General for Queensland remitted a reference to the Queensland Law Reform Commission to co-ordinate the project in 1992.

Following agreement of all States and Territories to participate in the project it was agreed that each agency involved in the project would consult within their respective jurisdictions on identified issues. In 1995 the Queensland Law Reform Commission published two Issues Papers to assist all agencies in that consultation process. Issues Paper 1 on *The Law of Wills* (WP46) and Issues Paper 2 on *Family Provision* (WP47) have been circulated widely within Queensland and other Australian jurisdictions.

The national committee steering the uniformity project will next meet in May 1996 to discuss two items: the Law of Wills and the Abolition of the Lex Situs Rule. A number of memoranda have been prepared by the Queensland Law Reform Commission to assist members of the national committee in the lead up to the May meeting. Memoranda 1 - 9 are on the law of wills and discuss in more detail the issues raised in Issues Paper 1 *The Law of Wills* (WP46). These memoranda use clauses of proposed Victorian legislation on Wills as the basis of discussion. A further memorandum on *The Effect of the Lex Situs and Mozambique Rules on Succession to Immovable Property* addresses quite technical matters relating to the succession of property.

The Queensland Law Reform Commission would appreciate any comments you would like to make on any or all of the enclosed memoranda. If you have not already received a copy of the Issues Papers on *The Law of Wills* and on *Family Provision* and would like a copy of one or both, please contact the Commission's office.

HOW TO MAKE COMMENTS AND SUBMISSIONS

You are invited to make comments and submissions on the issues and on the preliminary proposals in this Paper.

Written comments and submissions should be sent to:

The Secretary
Queensland Law Reform Commission
PO Box 312
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or by facsimile on: (07) 3247 9045

Oral submissions may
be made by telephoning: (07) 3247 4544

Closing date: 19 April 1996

It would be helpful if comments and submissions addressed specific issues or preliminary recommendations in the Paper.

CONFIDENTIALITY

Unless there is a clear indication from you that you wish your submission, or part of it, to remain confidential, submissions may be subject to release under the provisions of the *Freedom of Information Act 1992* (Qld).

The Commission may refer to or quote from submissions in future publications. If you do not wish your submission or any part of it to be used in this way, or if you do not want to be identified, please indicate this clearly.

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CHAPTER 1

THE SIGNIFICANCE OF THE LEX SITUS TO SUCCESSION LAW

1. THE POTENTIAL FOR CONFLICT BETWEEN THE LAWS OF THE VARIOUS STATES AND TERRITORIES

The succession laws of more than one Australian State or Territory may apply to the estate of a deceased person. This situation can arise because private international law (or the law of conflicts) draws a distinction between movables and immovables in relation to succession.[1]

(a) Movables

With respect to movables included in the estate of a deceased person, the law of the domicile (the *lex domicilii*) of the deceased person applies.

(b) Immovables

With respect to immovables included in the estate of a deceased person, the law of the place where the immovables are situate (the *lex situs*) applies.

(c) Purposes for which the distinction applies

The distinction applies for a number of purposes, for example:

- capacity to make a will;[2]
- essential validity;[3]
- testator's family maintenance legislation;[4]
- intestate succession.[5]

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1 This distinction has been addressed by the Australian Law Reform Commission in its Report *Choice of Law* Report No 58, 1992, which included draft legislation for the modification of the common law choice of law rules.

2 Nygh PE *Conflict of Laws in Australia* Butterworths (6th ed) 1995 (hereafter referred to as "Nygh") at 565.

3 Nygh at 571. See also *Heuston v Barber* (1990) 19 NSWLR 354 at 360.

4 *Re Paulin* [1950] VLR 462 at 465; *Heuston v Barber* (1990) 19 NSWLR 354 at 360.

5 *Re Ralston* [1906] VLR 689.

If the *lex domicilii* differs from the *lex situs*, outcomes almost certainly not adverted to by the deceased may well arise; and there are procedural complications.

The distinction no longer applies to questions of formal validity.[6] Nor does it apply to the revocation of a will by marriage, as that question has been classified as a law related to matrimonial law and not to succession law.[7]

2. THE CONSTITUTIONAL REQUIREMENT OF FULL FAITH AND CREDIT

Section 118 of *The Commonwealth of Australia Constitution Act* ("the Constitution")[8] provides that:

> Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.

The question arises whether, within Australia, the potential for the conflict of laws between the States is resolved by the constitutional requirement of full faith and credit. As Nygh[9] observes:[10]

> There are two possible interpretations of s 118: one which would not interfere with the choice of law rules developed at common law or, for that matter, with state and territorial legislation determining for those jurisdictions in what circumstances the law of another State of territory should be applied in their courts. The other interpretation would impose an obligation to give substantive effect to the laws of another State or territory through the prescription of a uniform rule of preference which could not be affected by a State or territorial legislative direction to the contrary.

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6 As to formal validity, all Australian States and Territories have adopted the provision based on the Hague Convention of 1960 on the Conflict of Laws Relating to the Form of Testamentary Dispositions. See *Succession Act 1981* (Qld) ss22-25; *Wills, Probate and Administration Act 1898* (NSW) ss32A-F; *Wills Act 1958* (Vic) ss20A-C; *Wills Act 1992* (Tas) ss29,30; *Wills Act 1936* (SA) ss25A-C; *Wills Act 1970* (WA) ss20-23; *Wills Act 1968* (ACT) ss15A-15H; *Wills Act 1938* (NT) ss15A-C. Prior to that legislation the position at common law was that the validity of a will of movables was governed by the law of the domicile of the deceased at the time of death, while a will relating to immovables was governed by the *lex situs*: Nygh at 565-566. See also Queensland Law Reform Commission *Wills: Memo 6 - Wills to which Foreign Laws Apply* December 1995.

7 *Re Martin* [1900] P 211 at 230 and 240; *In the Estate of Micallef* [1977] 2 NSWLR 929 at 933.

8 See Nygh at 13-14 for a discussion of the relationship between s118 of the Constitution and s18 of the *State and Territorial Laws and Records Recognition Act 1901* (Cth).

9 See Nygh at 14-20 for a discussion of the alternative interpretations of full faith and credit.

10 Id at 14.

A number of members of the High Court have expressed the view in recent times[11] that the effect of section 118 of the Constitution is that "only one body of law applies to an act or event in Australia",[12] irrespective of the State or Territory in which proceedings are brought.

However, that view - that the requirement of full faith and credit determines the selection of applicable laws - has been rejected by the majority of the High Court.

In *Breavington v Godleman*[13] Dawson J explained:[14]

> In my opinion, the requirement that full faith and credit be given to the laws of a State, statutory or otherwise, throughout the Commonwealth, affords no assistance where there is a choice to be made between conflicting laws. Once the choice is made, then full faith and credit must be given to the law chosen but the requirement of full faith and credit does nothing to effect a choice. Nor is it to the point to say that the full faith and credit requirement assumes the applicability of a single law. No doubt that is so, but it is to say no more than that where there is a conflict of laws upon a given question a selection must be made before the question can be answered. The conflict rules are based upon the same assumption but they, unlike the full faith and credit requirement, provide a basis upon which the selection can be made. Section 118 of the Constitution is not directed to a conflict of laws; where there is a conflict it makes no choice or, to put it another way, does not require the application of a law which is not otherwise applicable.

This view was followed by the Court in *McKain v Miller*,[15] in which the majority[16] confirmed the position which was "generally understood" prior to *Breavington v Godleman*[17] that "the rules for resolving conflicts of law in matters litigated in the forum were furnished by the common law of the forum".[18] It was held:[19]

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11 *Breavington v Godleman* (1988) 169 CLR 41 per Wilson and Gaudron JJ at 99; *McKain v R W Miller & Company (South Australia) Pty Limited* (1991) 174 CLR 1 per Gaudron J at 58; *Stevens v Head* (1993) 176 CLR 433 per Deane J at 460-462 and per Gaudron J at 463-465; *Goryl v Greyhound Australia Pty Limited* (1993) 179 CLR 463 per Deane and Gaudron JJ at 476.

12 *Stevens and Head* (1993) 176 CLR 433 per Gaudron J at 464.

13 (1988) 169 CLR 41.

14 Id at 150.

15 (1991) 174 CLR 1.

16 Brennan, Dawson, Toohey and McHugh JJ.

17 (1988)169 CLR 41.

18 *McKain v R W Miller & Company (South Australia) Pty Limited* (1991)174 CLR 1 per Brennan, Dawson, Toohey and McHugh JJ at 34.

19 Id at 37.

> The selection of the applicable rules governing liability is the function of the common law; s. 118 provides for recognition by the courts of the forum of the rules so selected....
>
> The problem, then, is to ascertain the content of the rules of the common law by which the choice of law is made.

This approach to the resolution of conflicts of laws was again adopted by the majority of the High Court in *Stevens v Head*.[20]

The result is that the question of the appropriate choice of laws rule is still very much a live issue in Australia.

The reason that succession law has not generated as much litigation in conflicts law as other areas of law, such as tort law, may lie in part in the fact that the common law choice of law rules in relation to succession (that is, succession to movables being governed by the law of the deceased's domicile and succession to immovables being governed by the *lex situs*) are relatively simpler in their application than other choice of law rules. In particular, the complexity of the double actionability rule in torts law,[21] combined with the extensive legislative changes made in a number of jurisdictions to the insurance schemes for injuries sustained in workplace and motor vehicle accidents (which have created significant differences in the damages recoverable in different jurisdictions), seem to have greatly increased the likelihood that plaintiffs and defendants in such actions will litigate those issues.

Also, it is not known to what extent estates are being distributed in ignorance of, or without reference to, the distinction between movables and immovables.

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20 (1993) 176 CLR 433.

21 See the cases referred to at footnote 11.

CHAPTER 2

THE NEED FOR REFORM

A number of anomalies can result from the different rules which govern succession to movables and immovables. These are demonstrated by the examples below.

1. DIFFERENCES IN WILL MAKING CAPACITY

This is an area where the differences in provisions between the States and Territories can result in consequences not contemplated by the testator, or as demonstrated by the following example, not even capable of avoidance by the testator.

Example 1

Bill and Sarah, who are both 16, are married in South Australia where they are domiciled.[22] They make wills which leave all their property to each other.

They go to work at Sarah's uncle's vineyard in South Australia. However, Bill does not get along with Sarah's uncle and soon regrets his early marriage. He and Sarah decide to separate and are divorced at 17.

Following her divorce, Sarah makes a second will leaving all her property to her only sister. Her only substantial asset is a home unit in Brisbane, which her mother, who died some years earlier, had left her. Although Sarah's father is still alive, he abandoned the family while Sarah and her sister were toddlers and she does not wish to make any provision for him in her will.

Sarah continues to work at the vineyard, where she is involved in an accident and dies.

Comment

Insofar as Sarah's capacity to make a will is concerned, the general rule is that the capacity of the testator as regards a will disposing of movable property is governed by the law of the domicile.[23]

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22 Their marriage was authorised by a Magistrate in accordance with s12 of the *Marriage Act 1961* (Cth) and they had the consent of Bill's parents and Sarah's father, her mother having died some years before.

23 Nygh at 565.

Accordingly, by virtue of section 5 of the *Wills Act 1936* (SA) (which recognises the capacity of a person under the age of 18 who is or has been married to make a will)[24] the movable property of Sarah's estate will pass to her sister in accordance with Sarah's second will.

As to the home unit in Brisbane, it seems that Sarah's capacity to make a will disposing of it will be governed by the *lex situs*.[25]

Under Queensland law[26] Sarah's first will in favour of Bill will be recognised, as she was a married person at the time of its execution. However, the dispositions in favour of Bill, as her former spouse, are revoked by operation of section 18(1) of the *Succession Act 1981* (Qld), which provides that the dissolution of the marriage of a testator revokes any beneficial disposition made in the will in favour of the testator's spouse. Because of the effect of section 8(3) of that Act, Sarah's second will is not recognised under Queensland law, as by the time of its execution, she was no longer married.

Accordingly, the home unit in Brisbane will not pass in accordance with her second will, but rather, will pass as on intestacy under Queensland law, that is, to her father.

2. THE POTENTIAL FOR "DOUBLE DIPPING"

The law seems to be that the surviving spouse can accumulate as many preferential shares as there are jurisdictions having immovables sufficient to pay the preferential shares. This might be seen as "double dipping".

In *Queensland Trustees, Limited v Nightingale*[27] Mrs Nightingale's husband had died intestate, domiciled in Queensland, leaving real and personal property in Queensland and two pieces of land in New South Wales. Mrs Nightingale had been paid the amount of £500 and half the balance of the assets of the estate by the administrators of her late husband's estate after they realised the Queensland assets and discharged all debts and liabilities. That was the amount to which she was entitled under the intestacy provisions of the relevant Queensland legislation. New South Wales had a similar intestacy provision and the question arose whether, in relation to the New South Wales property, the widow should receive £500 and half the balance or merely half the balance, having already received £500 under the Queensland legislation.

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24 See Queensland Law Reform Commission *Wills: Memo 1 - Preliminary Matters and Capacity* November 1995.

25 Nygh at 565.

26 *Succession Act 1981* (Qld) s8.

27 (1904) 4 SR (NSW) 751. See also *Re Collens* [1986] Ch 505.

The Court held that the widow was entitled to the extra £500, as her entitlement under the New South Wales legislation could not depend on whether or not her husband had property outside that State.[28]

This anomaly is likely to become more common as people lead more mobile lives and acquire assets (real and personal) in a number of different jurisdictions, as illustrated by the example below.

Example 2

John dies intestate, domiciled in Queensland, leaving a widow and three children. Two years before he died his father, living in New South Wales, had left him all his estate, which was comprised of a house in fee simple in Bathurst and an unfurnished rental unit in Canberra.

John's estate is worth $350,000 and consists of:

* his house and its contents in Brisbane worth $120,000;
* the house in Bathurst worth $100,000;
* the contents of the house in Bathurst worth $30,000;
* the unit in Canberra worth $100,000.

Comment

Under Schedule 2 of the *Succession Act 1981* (Qld) John's widow is entitled to one third of the deceased's movables and one third of any immovables in Queensland - $50,000 in total (ie $40,000 from the house and contents in Brisbane and $10,000 from the contents of the Bathurst house).

But as to the immovables situate in New South Wales and the Australian Capital Territory, there are provisions in the intestacy rules of each of those jurisdictions which give a more generous preferential share to the surviving spouse - the first $150,000 in New South Wales[29] and $100,000 in the Australian Capital Territory.[30]

Accordingly, in addition to the sum of $50,000 which the widow will receive under the *Succession Act 1981* (Qld), the widow will also receive the house in Bathurst and the

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28 (1904) 4 SR (NSW) 751 at 753.

29 *Wills, Probate and Administration Act 1898* (NSW) s61B and *Wills, Probate and Administration Regulation 1993* (NSW) cl 4.

30 *Administration and Probate Act 1929* (ACT) (6th Schedule).

unit in Canberra - an additional $200,000, making a total of $250,000 out of the estate.

Had all of the estate been situate in Queensland, or consisted entirely of movables, the widow would only have received $116,666.66.

3. REVOCATION OF A WILL BY MARRIAGE OR DIVORCE

There is a further matter which probably does not arise as a result of the *lex situs* rule, but which is nevertheless highlighted by an estate which leaves real property in a jurisdiction other than the one in which the deceased died domiciled.

Example 3

A testator dies domiciled in Queensland leaving "all my realty" to his eldest child, making a very generous provision for his wife, and leaving a substantial residue to charity.

Three years before the testator's death, he and his wife divorced (while domiciled in Queensland). A year later (ie two years before his death) his mother died, leaving him a home in Hobart.

Comment[31]

The deceased's movables will pass in accordance with the law of Queensland. Since section 18 of the *Succession Act 1981* (Qld) provides that in the event of divorce provision made by will for the divorced spouse does not have effect, the disposition to the deceased's former wife is revoked, with the result that the movables left by the deceased in Queensland will go to charity.

The deceased's immovables in Queensland will also pass in accordance with the law of Queensland, such that any realty in Queensland will pass to the eldest child, in accordance with the terms of the deceased's will.

It is not so clear, however, as to which jurisdiction's law will govern how the home in Hobart will pass. As noted in Chapter 1,[32] the question of revocation of a will by marriage has been held to be a law with respect to marriage, rather than one with

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[31] See Australian Law Reform Commission's recommendation for reform at 16 below.

[32] At 2 above.

respect to succession law,[33] and therefore unaffected by the rule that immovables are governed by the *lex situs*. Nygh suggests that the effect of divorce on a will would be similarly classified:[34]

> In *Re Martin* the English Court of Appeal classified the rule [of revocation of a will by subsequent marriage] as part of English matrimonial law and not as part of its testamentary law. Consequently it is the law of the husband's domicile at the time of the marriage which determines whether the rule applies. The same rule applies to immovable property....
>
> In Queensland and New South Wales it is provided that divorce or annulment revokes any beneficial disposition or appointment as executor or executrix made by the testator in favour of his or her former spouse. In Tasmania divorce or annulment has the effect of revoking an existing will in its entirety, unless made in contemplation of dissolution of marriage. It is submitted that by parity of reasoning the effect of a dissolution or annulment on a will is determined by the law of the domicile of the testator at the time of the decree.

If Nygh is correct in that view and it is the law of the deceased's domicile at the date of the divorce decree that applies, Queensland law will also apply to the devise to the deceased's eldest child in this example, such that the home in Hobart will pass to the deceased's eldest child.

If, however, the law of Tasmania, as the *lex situs*, applies, the home in Hobart will not pass exclusively to the deceased's eldest son in accordance with the will. The reason is that section 11 of the *Wills Act 1918* (Tas) provides that divorce revokes the will in its entirety. That provision would cause the property in Hobart to pass as on the intestacy of the deceased according to Tasmanian intestacy law,[35] that is, to all his children.

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33 *Re Martin* [1900] P 211 at 240; *In the Estate of Micallef* [1977] 2 NSWLR 929 at 933.

34 Nygh at 578.

35 *Administration and Probate Act 1935* (Tas) s 44(3).

CHAPTER 3

OPTIONS FOR REFORM

1. ABOLITION OF THE LEX SITUS RULE

There is an argument that the anomalies referred to in Chapter 2 could be avoided if the rule that the *lex situs* governs succession to immovable property were replaced by a rule in favour of the *lex domicilii* in all cases.

The Australian Law Reform Commission in its Report *Choice of Law*[36] recommended that:[37]

> the basic choice of law rule in matters concerning succession should be that the matter is to be determined according to the law in force in the place where the deceased was last domiciled.

There is a further argument that the benefits of such a provision would be enhanced by legislation providing, in certain circumstances, for the automatic recognition within Australia of grants of probate and letters of administration. This would reduce the administration costs[38] which presently result in those cases where it is necessary to have the grant of probate or letters of administration resealed in a number of jurisdictions.

2. SUGGESTED LEGISLATION

(a) Abolition of the lex situs rule

The Australian Law Reform Commission suggested the following provision in its *Draft uniform State and Territory Choice of Law Bill 1992:*[39]

> 12.(5) Any other question concerning succession, except a question relating to the capacity of the testator to make a testamentary instrument, is to be determined in accordance with the law in force in the place where the deceased person was last domiciled. In this subsection "law" includes a law that relates to choice of law.

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36 Report No 58 1992.

37 Id at 111.

38 See the Law Reform Commission of Western Australia *Report on Recognition of Interstate and Foreign Grants of Probate and Administration* Project No 34 Part IV November 1984 at 13-15 for a discussion of the cost, inconvenience and delay involved in the resealing of grants of probate.

39 At 181. The *Draft Uniform State and Territory Choice of Law Bill 1992* is appended to the Australian Law Reform Commission's Report *Choice of Law* Report No 58 1992.

In the memorandum *Distribution of the Deceased's Estate - the Significance of the Lex Situs*,[40] the Queensland Law Reform Commission suggested a different provision.[41] However, upon further consideration, the Commission is of the view, given the Australian Law Reform Commission's work in this area and the approach already adopted in New South Wales, that it would better advance the goal of uniformity to invite comment on the draft provision suggested by the Australian Law Reform Commission, rather than suggest an alternative provision at this stage.

The Australian Law Reform Commission's draft provision has the advantage, at least as far as court orders are concerned,[42] that it would not require reciprocity between all States and Territories to be effective. Legislation abolishing the *lex situs* rule could be passed by any jurisdiction, although the benefits of the legislation would only be effective if that jurisdiction also abolished, at least in part, the Mozambique rule, which would otherwise prevent a court of that jurisdiction from making an order with respect to title to interstate immovables.[43]

The Australian Law Reform Commission's draft provision is also consistent with the approach adopted in New South Wales, which, although it has not generally abolished the *lex situs* rule, has passed legislation to abolish the Mozambique rule[44] and to allow the courts of that State to make family provision orders affecting title to immovable property situated interstate.[45]

The draft provision would, however, operate to apply the law of the domicile, rather

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40 This was distributed for Uniform Succession Project Meeting No 1, Brisbane, September 1995.

41 Suggested legislation (for legislation originating in Queensland):

> (1) Where a person dies domiciled in a State or Territory of Australia other than Queensland leaving immovables situate in Queensland the law of succession of the immovables shall, from the commencement of this Act, be the law of the domicile of the deceased at the date of the deceased's death.

The benefits of this provision would arguably only be effective in jurisdictions other than the jurisdiction which passed the law.

42 An order made by a court affecting title to immovable property in another jurisdiction could be registered under Part 6 of the *Service and Execution of Process Act 1992* (Cth) in a court of another jurisdiction and enforced as if it were an order of the latter court. The position is not so clear in cases which do not involve the enforcement of a court order. If, for example, the *lex situs* rule were abolished in Victoria, but not in Queensland, by what law should an administrator appointed in respect of the estate of a deceased who died intestate and domiciled in Victoria distribute the estate? Should the administrator of that estate, if it includes real property in Queensland, distribute the real property in Queensland according to the intestacy provisions of Victoria (being the domicile of the deceased) or Queensland (being the situs of the real property)?

43 The effect of the Mozambique rule is considered in Ch 4 of this memorandum.

44 The *Jurisdiction of Courts (Foreign Land) Act 1989* (NSW).

45 The *Family Provision (Foreign Land) Act 1989* (NSW) amended s11(1)(b) of the *Family Provision Act 1982* (NSW) so that it now provides that an order for provision out of the estate or notional estate of a deceased person may be made in respect of property in *or outside* New South Wales.

than the *lex situs*, to questions of succession to immovables, regardless of whether the domicile of the deceased was an Australian State or Territory or a foreign country. The Australian Law Reform Commission did not foresee any significant difficulties with the extension of the proposed rule to overseas choice of law issues:[46]

> A unitary rule would lead to few problems in Australia. Laws prohibiting foreigners from owning land, rules restricting inheritance to males, or first born males, are not part of Australian law and the abolition of the lex situs would cause no difficulties of that kind in Australia. If the rule were extended to overseas choice of law issues, there are unlikely to be difficulties which could not be overcome. An overseas country with policies restricting inheritance might choose to confine its rules to inheritance to land within its jurisdiction but that would operate as a domestic rule of the law of the domicile or nationality.

The Queensland Law Reform Commission accepts, in relation to persons domiciled in a State or Territory of Australia, that a rule which determines succession to immovable property within Australia according to the law of the domicile of the deceased (that is, the law of a particular State or Territory within Australia) has a number of advantages.[47]

The Commission queries, however, whether it is necessary (or even desirable), in order to achieve those advantages, for the proposed rule to apply when the deceased has been domiciled overseas. Different considerations may well apply in those circumstances. Should the succession laws of a foreign country necessarily apply to immovable property in Australia or should succession to such property be determined by the law of one of the Australian States or Territories? If so, the provision suggested by the Australian Law Reform Commission should be limited so that it only has effect within Australia.

(b) Automatic recognition within Australia of grants of probate and letters of administration

Legislation is suggested in the following terms (for legislation originating in Queensland):

> A grant of probate or letters of administration issuing from the Court of the State or Territory of the domicile of the deceased and bearing a notation of the domicile of the deceased shall have the same effect and be given the same recognition in Queensland as a grant issuing from the Supreme Court of Queensland.

The rationale for this clause, including the requirement that the deceased's domicile should be notated on the grant of probate or letters of administration, was

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46 Australian Law Reform Commission *Choice of Law* Report No 58 1992 at para 9.9.

47 See the advantages set out at 13-14 below.

comprehensively addressed by the Law Reform Commission of Western Australia in its *Report on Recognition of Interstate and Foreign Grants of Probate and Administration*.[48]

The effect of the clause would be that a grant of probate or letters of administration which issued from a court of the jurisdiction in which the deceased died domiciled would, if it bore the notation as to the deceased's domicile, be automatically recognised throughout Australia.[49]

On the other hand, if the grant or letters issued other than from a court in the jurisdiction in which the deceased died domiciled, or did not notate the domicile of the deceased, the grant or letters would not qualify for automatic recognition[50] and would still require resealing in the State of the deceased's domicile.

As all Australian jurisdictions have adopted domicile legislation in the same terms,[51] they will all apply the same rules in determining where a person died domiciled,[52] such that there should be no disputes as to that issue.

3. ARGUMENTS FOR REFORM

Considerable advantages may arguably result from the abolition of the effect of the *lex situs* in such cases:

(a) A more rational approach to choosing the applicable rules for distribution

The "mix" of movables and immovables constituting the estate of a person dying in Australia should not have the effect that two or more succession laws apply, let alone which of them. As the Australian Law Reform Commission has noted:[53]

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48 Project No 34 Part IV November 1984.

49 This provision would not require reciprocity between the States and Territories, although the benefits of the provision would only be effective in jurisdictions other than the jurisdiction which enacted the provision.

50 The Law Reform Commission of Western Australia *Report on Recognition of Interstate and Foreign Grants of Probate and Administration* Project No 34 Part IV November 1984 at 61.

51 Id at 17. See *Domicile Act 1981* (Qld); *Domicile Act 1979* (NSW); *Domicile Act 1982* (Cth); *Domicile Act 1978* (Vic); *Domicile Act 1980* (Tas); *Domicile Act 1980* (SA); *Domicile Act 1981* (WA); *Domicile Act 1979* (NT).

52 The Law Reform Commission of Western Australia *Report on Recognition of Interstate and Foreign Grants of Probate and Administration* Project No 34 Part IV November 1984 at 82.

53 Australian Law Reform Commission *Choice of Law* Report No 58 1992 at para 9.7.

> The ease with which movable property can be converted to immovables or vice versa, and the equitable doctrines which have notionally assisted that process,[54] have made the distinction increasingly artificial as a basis for choice of law rules.

(b) Better knowledge of local law

It is arguable that a testator and his or her solicitor are more likely to have an understanding of the *lex domicilii* than the *lex situs*, where they are not the same. In any case, it might not be contemplated at the time of making a will that inter-State immovables will ever form part of the deceased's estate.

(c) Minimisation of costs

To require the personal representative to go through the process of applying for a grant of probate or letters of administration, or a reseal, in every jurisdiction where immovables are situate may involve considerable cost, inconvenience and delay.[55]

4. ARGUMENTS AGAINST REFORM

(a) That control is relinquished over immovable property in own jurisdiction

All that is sought is reciprocity between the States and Territories in recognising the grant of probate or letters of administration of the States and Territories of the domicile and permitting those concerned with title to immovables, such as Registrars of Titles, to act on the grant.

If it is thought that the State is "losing" jurisdiction in respect of immovables within its own borders, it may be pointed out that the State is "gaining" jurisdiction over immovables situate outside its borders.

(b) Loss of revenue protection

The main disadvantage of abolishing the *lex situs* rule is that it would make it more difficult for jurisdictions to protect their revenue collection by way of death duties. The argument was that succession according to the law of the jurisdiction where the real property was situated made the avoidance of the payment of death duties more difficult. However, as no Australian States or Territories now impose such duties, that argument does not have the same force.

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54 *Haque v Haque* (No 2) (1965) 114 CLR 98.

55 See The Law Reform Commission of Western Australia *Report on Recognition of Interstate and Foreign Grants of Probate and Administration* Project No 34 Part IV November 1984 at 13-15. However, one commentator from Western Australia has, in a submission to the Queensland Law Reform Commission, suggested that the practice of resealing is (at least in Western Australia) procedurally simple and relatively inexpensive.

The Law Reform Commission of Western Australia adverted to this problem in its *Working Paper on Recognition of Interstate and Foreign Grants of Probate and of Letters of Administration*.[56] It proposed tentatively that:[57]

> as part of any scheme of automatic recognition of Australian grants, that each state and territory should provide that when any original grant is sought, or when any overseas grant is sought to be resealed, the applicant or his representative should be required to file an inventory of all property, real and personal, of the deceased situated within Australia, and that the court then forward a copy to the revenue authority of each state and territory within which such property is situated. Each state and territory would then be able to protect its own revenue by appropriate legislation.

5. CLARIFICATION OF EFFECT OF MARRIAGE AND DIVORCE ON A WILL

It is undesirable that there should be any confusion about the effect of marriage or divorce on a will that disposes of immovable property in a jurisdiction in which the testator is not domiciled.[58] Strictly speaking, the confusion does not arise because of the effect of the *lex situs* rule, but because of the common law rules as to the classification - whether the particular dispositive domestic law that divorce revokes a will is classified as dealing with matrimonial law or succession law.

While in that sense the issue is only peripheral to this memorandum, it would seem that it is capable of clarification and that it would be desirable to do so. This is also the view reached by the Australian Law Reform Commission in its Report *Choice of Law*.[59] While that Commission recommended a number of statutory modifications to the choice of law rules, it did not deal in general with questions of classification, save for the question of revocation of a will:[60]

> This chapter does not deal in general with the question of characterisation. In using the term 'succession' and in subsection 4 of the draft legislation 'question concerning succession' there is no intention to change the common law rules as to what is 'succession', except as expressly provided in the rule for revocation of a will.

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56 Project No 34 Part IV December 1980.

57 Id at 50.

58 See Example 3 at 8 above.

59 Report No 58 1992.

60 Id at para 9.3.

The Australian Law Reform Commission suggested the following provision in the *Draft uniform State and Territory Choice of Law Bill* appended to its Report:[61]

> The question whether a testamentary instrument has been revoked by marriage or divorce is to be determined in accordance with the law in force in the place where the deceased was domiciled at the time of the marriage or divorce.

This provision accords with Nygh's view of the current law, as set out in the previous Chapter.[62]

If the law were to be clarified in this way, in Example 3 set out in the previous Chapter, it would be clear that the law of Tasmania had no application, the deceased having been domiciled in Queensland at the date of his divorce.

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61 Id at 181 (cl 12(4)).

62 At 9 above.

Issues for Consideration

(1) Should the rule that the *lex situs* governs succession to immovable property be replaced by a rule whereby the law of the place where the deceased was last domiciled will govern such questions?

(2) If yes, should the new rule be limited in its application to those cases where the last domicile of the deceased is an Australian State or Territory?

(3) Should a grant of probate or letters of administration issuing from the court of the State or Territory where the deceased was domiciled and bearing a notation of the domicile of the deceased have the same effect and be given the same recognition in the legislating jurisdiction as if it had issued from the Supreme Court of the legislating jurisdiction?

(4) If yes, would any consequential amendments be required to give effect to this proposal - for example, to the legislation of the States and Territories which provides for the registration of title to real property?

(5) Should the question whether a will has been revoked by marriage or divorce be determined in accordance with the law in force in the place where the deceased was domiciled at the time of the marriage or divorce?

(6) Are there any difficulties, not identified in this memorandum, likely to arise as a result of the implementation of the proposals discussed in this Chapter?

CHAPTER 4

ABOLITION OF THE MOZAMBIQUE RULE[63]

1. INTRODUCTION

If it is thought desirable that succession to immovable property should be determined by the law of the domicile of the deceased, rather than the *lex situs* (where they are different), it is necessary to consider an existing limitation on a court's jurisdiction to deal with interstate (or foreign) property.

At common law, a court does not have jurisdiction to deal with foreign land, or to decide questions involving title to foreign land. This rule is known as the *Mozambique* rule, after the decision of the House of Lords, which affirmed the rule, namely, *The British South Africa Company v The Companhia de Moçambique*.[64] The rule is generally regarded as having two limbs:[65]

(1) an English court will not exercise jurisdiction in respect of the title to, or possession of, land situated abroad; and

(2) an English court will not entertain an action for trespass to foreign land even if the plaintiff's title is not in issue.

The rule has been criticised for producing anomalous, arbitrary and unsatisfactory results.[66] For example, in *Corvisy v Corvisy*[67] the plaintiffs (who were the mother and sister respectively of the defendant) applied to the Supreme Court of New South Wales for interim injunctions to restrain the defendant from entering or remaining in either the first plaintiff's home in Wollongong or the second plaintiff's home in Canberra, and from assaulting, molesting, annoying or otherwise interfering with the plaintiffs.

McLelland J held that although the court had jurisdiction to restrain the apprehended assaults and molestation, it did not have jurisdiction to restrain the apprehended trespass in relation to the real property in the Australian Capital Territory:[68]

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63 This topic was comprehensively addressed by the New South Wales Law Reform Commission in its Report *Jurisdiction of Local Courts over Foreign Land* LRC 63 June 1988, which also outlined the historical development of the rule.

64 [1893] AC 602.

65 Nygh at 113.

66 New South Wales Law Reform Commission *Jurisdiction of Local Courts over Foreign Land* LRC 63 June 1988 at 8-10.

67 [1982] 2 NSWLR 557.

68 Id at 558.

> In my view the first question must be answered in the negative by virtue of the operation of the principle exemplified by the decision of the House of Lords in *Hesperides Hotels Ltd v Muftizade* [1979] AC 508 to the effect that a court has no jurisdiction in proceedings founded upon the title to or possession of real property outside its territorial jurisdiction, in the case of this Court outside the State of New South Wales. The principle has been held to be applicable as between the various States and Territories of Australia: see eg *Inglis v Commonwealth Trading Bank of Australia* (1972) 20 FLR 30.

It is beyond the scope of this memorandum to examine the full implications of the *Mozambique* rule. Accordingly, this memorandum is confined to raising for consideration aspects of the rule which have a bearing on succession laws.

2. EXCEPTIONS TO THE MOZAMBIQUE RULE

The rule is subject to a number of exceptions,[69] one of which is in probate and administration suits, where the court has assumed jurisdiction to determine questions on which the title to foreign land depends.[70] The cases cited as authorities for the exception are *Earl Nelson v Lord Bridport*[71] and *In re Duke of Wellington*.[72] Both cases involved the determination of title to land. However, the first case was decided almost 50 years before the decision in *The British South Africa Company v The Companhia de Moçambique*,[73] while the second made no reference to that decision either in the judgment of the Court of Appeal[74] or at first instance.[75]

While the scope of this exception is not entirely clear, it is at least settled that the exception does not apply to the exercise of a court's power to make provision for dependants of a deceased person under family provision legislation. In *Re Paulin*[76]

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69 See New South Wales Law Reform Commission *Jurisdiction of Local Courts over Foreign Land* LRC 63 June 1988 at Ch 4.

70 Nygh at 115-116. See also New South Wales Law Reform Commission *Jurisdiction of Local Courts over Foreign Land* LRC 63 June 1988 at 42.

71 (1846) 8 Beav 547; 50 ER 215.

72 [1948] 1 Ch 118.

73 [1893] AC 602.

74 [1948] 1 Ch 118.

75 *In re Duke of Wellington* [1947] 1 Ch 506.

76 [1950] VLR 462.

the court held that:[77]

> The Courts of the *situs* can alone exercise a discretionary power to affect, and then only if there is testator's family maintenance legislation in the *situs* providing for it, immovables of the testator out of the jurisdiction of the Courts of his domicil; and the Courts of his domicil cannot exercise their discretion so as to deal with such immovables...

For that reason, the exclusion of the court's jurisdiction to deal with foreign immovable property is very much a live issue.

3. APPLICATION OF THE MOZAMBIQUE RULE TO SUCCESSION LAWS

An example of the impact of the *Mozambique* rule on family provision is found in *Heuston v Barber*[78] (a case decided before the *Mozambique* rule was abolished in New South Wales by the *Jurisdiction of Courts (Foreign Land) Act 1989* (NSW)). In that case, the plaintiff applied for family provision under the *Family Provision Act 1982* (NSW). However, the estate had by that time been fully administered and distributed. Almost the entire estate had been left to the defendant (the plaintiff's half-sister, who lived in Queensland), who had used it to acquire a property in Queensland. The question for the court was whether under the "notional estate" provisions of the *Family Provision Act 1982* (NSW)[79] it could make an order with respect to the Queensland real property:[80]

> The question then is whether or not the fact that the property which the plaintiff seeks to have made the subject of a designating order in this action would be both notional estate if so designated and property which did not form part of the estate of the deceased makes any difference to the matter so that some different principle would apply. While parts of the *Family Provision Act* which relate to notional estate and give power to the court to make orders which would affect the rights of third parties are not properly characterised as laws concerning succession they would nevertheless in those circumstances be laws affecting title to property and at least so far as real estate was concerned would have to be determined in this instance by the law of Queensland where there is no similar provision relating to notional estate; **In any event the Mocambique rule (*British South Africa Co v Companhia de Mocambique* [1893] AC 602) establishes that the New South Wales court would have no jurisdiction at least until the *Jurisdiction of Courts (Foreign Land) Act 1989* commences.**

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77 Id at 465.

78 (1990) 19 NSWLR 354.

79 Ss 23-25.

80 *Heuston v Barber* (1990) 19 NSWLR 354 at 360-361.

> It seems an extraordinary gap in the legislation if an executor beneficiary can defeat its purpose by distributing the estate to herself and investing the proceeds of that distribution in real estate outside the State of New South Wales but nevertheless it seems that a gap exists. **[emphasis added]**

For that reason, although the court found that a proper provision for the plaintiff would have been to give her an amount of $25,000,[81] it held that the only property over which it could make an order was the motor vehicle purchased by the defendant out of the proceeds of the testator's estate for approximately $7,500.[82] The motor vehicle could be made subject to such an order because it was movable property and therefore not beyond the court's jurisdiction.

The second limb of the rule (that a court will not entertain an action for trespass to or for other torts concerning foreign land) has been subject to considerable criticism.[83] However, it is the first limb of the rule (that jurisdiction is denied in actions for the determination of title to, or the right to possession of, foreign land), which has the greater impact on succession laws.

That first limb has not been the subject of the same degree of criticism as the second.[84] To some extent it can be justified on the basis that a local court should not assume jurisdiction in a matter in which its judgment cannot be enforced.[85] However, the force of that argument is weakened, as between the Australian States and Territories, because of two legislative schemes:

(a) The *Service and Execution of Process Act 1992* (Cth)

Part 6 of that Act permits the registration and enforcement in the court of one State or Territory of a judgment made by the court of another State or Territory.

(b) The complementary cross-vesting scheme

In 1987 the Commonwealth passed the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth), which was complemented by legislation by the States and Territories. The effect of the scheme is that the Supreme Courts of the States and Territories are vested with the civil jurisdiction of the other States and Territories, the Family Court and (with certain exceptions) the jurisdiction of the

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81 Id at 359.

82 Id at 362-363.

83 Noted in New South Wales Law Reform Commission *Jurisdiction of Local Courts over Foreign Land* LRC 63 June 1988 at 55-59.

84 Id at 59.

85 Id at 2.

> Federal Court. The Federal and Family Courts are similarly vested with the jurisdiction of the Supreme Courts of the States and Territories. The legislation provides for a judgment given in the exercise of the cross-vested jurisdiction to be enforceable as if it had been given in the exercise of the Supreme Court's jurisdiction apart from any such law.[86]

The continued application of the *Mozambique* rule to questions concerning succession has the potential to cause unnecessary expense and delay and even injustice,[87] as occurred in *Heuston v Barber*.[88] The New South Wales Law Reform Commission has given an example of the expense and delays which can result:[89]

> ... if a person dies domiciled in New South Wales, but possessed of immovable property outside the State, the court in this State must entirely disregard the existence and value of that immovable property in determining whether the deceased has made adequate provision for his or her dependants. The latter must commence fresh proceedings, before the courts at the location of that immovable [property], for relief in relation thereto...

Although the difficulties raised by the example have now been overcome in New South Wales, they still apply in jurisdictions which retain the *Mozambique* rule.

4. ABOLITION OF THE MOZAMBIQUE RULE

The New South Wales Law Reform Commission in its report *Jurisdiction of Local Courts over Foreign Land*[90] recommended that the jurisdiction of the courts of New South Wales be extended to hear and determine a matter, even though that matter relates to or may otherwise concern land outside the State.[91] That Commission's recommendation was implemented in the form of the *Jurisdiction of Courts (Foreign Land) Act 1989* (NSW), the substantive sections of which provide:

> **Jurisdiction with respect to foreign land (the Mozambique rule abolished)**
>
> **3.** The jurisdiction of any court is not excluded or limited merely because the proceedings relate to or may otherwise concern land or immovable property

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86 See eg *Jurisdiction of Courts (Cross-vesting) Act 1987* (Qld) s14.

87 New South Wales Law Reform Commission *Jurisdiction of Local Courts over Foreign Land* LRC 63 June 1988 at 63-64.

88 (1990) 19 NSWLR 354.

89 New South Wales Law Reform Commission *Jurisdiction of Local Courts over Foreign Land* LRC 63 June 1988 at 64.

90 LRC 63 June 1988.

91 Id at 73.

situated outside New South Wales.

Court may decline jurisdiction with respect to foreign land

4. A court is not required to exercise jurisdiction under this Act if the court considers that it is not the appropriate court to hear the proceedings.

The Australian Law Reform Commission also recommended the abolition of the rule in respect of succession.[92] As that Commission pointed out:[93]

> In principle once the lex situs has been abolished by a new choice of law rule the inability to make orders in respect of foreign land is anomalous.

The Australian Law Reform Commission's *Draft uniform State and Territory Choice of Law Bill 1992*[94] provided for the partial abolition of the rule in clause 12(6), which reads:[95]

> The rule of the common law known as the Mozambique rule (British South Africa Co. *v* Companhia de Moçambique and others [1893] A.C. 602) is abolished in its application to questions concerning succession.

It is beyond the scope of this memorandum to suggest the abolition of the rule generally. However, the abolition of the rule, at least as it applies to "questions concerning succession" would seem to be sufficient to alleviate the problems caused by the rule in succession matters.

The main difference between the New South Wales provision and the Australian Law Reform Commission's proposed provision (apart from the fact that the New South Wales provision is of general application) is that the New South Wales legislation incorporates the express recommendation of the New South Wales Law Reform Commission[96] that its primary recommendation regarding the extension of the jurisdiction of New South Wales courts be:[97]

> ... subject to the condition that courts in the State should exercise that jurisdiction only if the court is of the view, in the light of all the surrounding circumstances, that it is the most appropriate forum for the resolution of the matters in dispute.

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92 Australian Law Reform Commission *Choice of Law* Report No 58 1992 at para 9.11.

93 Id at para 9.10.

94 This is appended to the Australian Law Reform Commission's Report *Choice of Law* Report No 58 1992.

95 Id at 181.

96 New South Wales Law Reform Commission *Jurisdiction of Local Courts over Foreign Land* LRC 63 June 1988 at 73.

97 Ibid.

Interestingly, that condition was recommended by the New South Wales Law Reform Commission prior to the High Court's rejection of the doctrine of *forum non conveniens*[98] in *Oceanic Sun Line Special Shipping Company Inc v Fay*.[99] Such a condition may be necessary to prevent forum shopping in the event of a complete abolition of *Mozambique* rule. However, in the context of a change to succession laws, whereby the domicile of the testator at the date of death will determine which laws apply to questions concerning succession, it would not appear to be so critical.

Issues for Consideration

(1) Should the *Mozambique* rule be abolished insofar as it applies to succession laws?

(2) If so, would either the *Jurisdiction of Courts (Foreign Land) Act 1989* (NSW) (if limited to questions concerning succession) or the provision in the Australian Law Reform Commission's *Draft uniform State and Territory Choice of Law Bill 1992* be appropriate to form the basis of model legislation?

(3) If neither of those provisions is considered suitable, what are the requirements for appropriate model legislation?

...otherref\successi\draftrep\mp.16

98 Ibid.

99 (1988) 165 CLR 197. In that case, the plaintiff (respondent) was injured on a cruise ship owned by the defendant (appellant) and sued the defendant for damages for negligence in the Supreme Court of New South Wales. The defendant applied for a stay of the action on the ground that Greece was the more appropriate forum. The accident happened in Greek waters and the contract of carriage was to be performed in Greece, but (the court found) New South Wales was the State in which the contract had been made. The court held that the plaintiff was entitled to have his action heard and determined by the Supreme Court of New South Wales and dismissed the appeal.